STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASAD ABRAHAMIAN, Charging Party, v. COACHELLA VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5635-E PERB Decision No. 2335 October 17, 2013

Appearances: Asad Abrahamian, on his own behalf; Fagen Friedman & Fulfrost by Milton E. Foster, Attorney, for Coachella Valley Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Asad Abrahamian (Abrahamian) from the partial dismissal (attached) of his unfair practice charge. Abrahamian's charge, as amended, alleges that the Coachella Valley Unified School District (District) violated the Educational Employment Relations Act (EERA)[2] when it involuntarily transferred him to another school site because he engaged in protected conduct.

We have reviewed the unfair practice charge, the amended charge, the warning and dismissal letters, the appeal and the entire record in light of relevant law. Based on this review,

[1] PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

we affirm the partial dismissal. In doing so, we affirm the Board agent's analysis with regard to adverse action and employer knowledge, but not as to protected activity.

PROCEDURAL HISTORY

On November 30, 2011, Abrahamian filed an unfair practice charge. PERB's Board agent issued a warning letter on February 15, 2012. The District submitted a position statement on February 21, 2012. Abrahamian filed an amended charge on March 12, 2012. The District filed a second position statement on April 25, 2012. PERB's Board agent issued a partial dismissal of Abrahamian's charge on May 14, 2012. Abrahamian filed an appeal of the Board agent's decision on May 25, 2012. On June 21, 2012, PERB's Appeals Office notified the parties that the filings were complete and that the case was placed on the Board's docket.

DISCUSSION

Our discussion below addresses charge allegations. We presume the facts alleged are true. We do so because when assessing the dismissal of an unfair practice charge, we view the allegations in the light most favorable to the charging party.[3]

1. Factual Background

Abrahamian was a science teacher at Coachella Valley High School (CVHS). His wife Shahla Mazdeh (Mazdeh) was also a teacher at CVHS. Either in 2008 or 2009, the charge and amended charge leave this unclear, Abrahamian and Mazdeh observed and reported cheating by another member of CVHS's certificated staff during administration of the California Standardized Test (CST). According to Abrahamian, this staff member admitted to helping

[3] At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

students on the test. Abrahamian reported the cheating to the district superintendent, district board members and to representatives of his union.

After some unspecified time, Abrahamian asked another union member for advice on how to proceed with the cheating report. It was not alleged whether this person held a leadership position within the union. At some point before receiving a response from the union member, the principal of CVHS and her assistant admonished Abrahamian for spreading "rumors" about cheating on the CST. After the initial report about cheating on the CST, Abrahamian alleges that there was an increase in hostility toward him by the District and the union. He alleges that he was discriminated and retaliated against by the District administration. Specifically, Abrahamian points to the admonishment from the CVHS principal, a physical attack by a member of the union, and a request that he resign from yet another member of the union.

On October 15, 2010, Abrahamian was assaulted by a group of students who had gathered near the teachers' lounge. No security personnel or administrators were in the area at the time. Abrahamian reported the incident to the District, the union and the Sheriff's Department. Abrahamian alleges that "harassment and retaliation by the District increased." He alleges no further specific incidents of harassment or retaliation in 2010.

On January 27, 2011, "the District" (Abrahamian does not specify whom) asked Abrahamian to voluntarily transfer to a different school site, which he refused to do. Sometime in March of 2011, Abrahamian and Mazdeh once again observed cheating by certificated staff during administration of the California High School Exit Exam (CAHSEE). Abrahamian reported his observations to the union president. On June 1, 2011, Abrahamian was involuntarily transferred to another high school within the District, but one which necessitated "100 miles round trip" between his home and his work site. Since the involuntary transfer may have violated the collective bargaining agreement between the union and the District, Abrahamian

filed a grievance on June 2, 2011. Abrahamian alleges that all of these actions by the District were a response to his whistleblowing activity.[4]

2. The Board Agent's Dismissal

On May 14, 2012, PERB's Board agent issued a partial dismissal of Abrahamian's unfair practice charge. The dismissal letter pointed out the deficiencies which had been identified in the warning letter of February 15, 2012: that Abrahamian's charge did not state a prima facie case because it:

- failed to allege sufficient facts to show that it was timely filed;
- failed to establish that the relevant decision maker knew about Abrahamian's alleged protected conduct; and
- failed to establish the illegal motivation requirement, necessary to a prima facie case of retaliation.

The Board agent found that Abrahamian's amended charge had addressed the timeliness issue, but still failed to cure the other two defects noted above. The Board agent determined, however, that Abrahamian did not provide facts demonstrating "that the relevant decision maker knew of Charging Party's alleged protected activity" or establishing "the close temporal proximity" necessary to show illegal motivation. Abrahamian's charge was, therefore, dismissed.

[4] We note, at this point, that Abrahamian's appeal from the Board agent's partial dismissal contains new factual allegations, including some which respond to deficiencies pointed out in the warning and dismissal letters. As PERB Regulation 32635(b) makes clear, "unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Abrahamian states in his appeal that after reading the warning and partial dismissal letters, he realized, for the first time, that his attorney "did not provide a complete and comprehensive narrative." Since Abrahamian terminated the services of his attorney on March 27, 2012, and began representing himself in pro per, it was incumbent upon him to make sure there were no deficiencies in his pleadings. He had time to either do so or request an extension of time before the Board agent's final decision. Yet, he did neither. Accordingly, in so far as Abrahamian's appeal of the Board agent's partial dismissal contains new factual allegations, those allegations are not considered in our decision.

The dismissal letter adopted the reasons set forth in the February 15, 2012, warning letter except for the issue of timeliness. The warning letter pointed out that Abrahamian had not alleged an adverse action within the six-month period preceding his filing of the charge. Abrahamian's attorney had mentioned the filing of a grievance, but failed to mention the adverse action (the involuntary transfer) that occurred within the statutory period. This defect was cured in the amended charge. The dismissal letter therefore found that Abrahamian had filed a timely charge.

a. The *Novato* Test

The Board agent stated that EERA gives employees the right to participate in the activities of employee organizations (EERA, § 3543) and to be free from employer retaliation for participating in those activities. (EERA, § 3543.5(a).) The Board agent stated that the proper test to establish whether or not a prima facie case of retaliation has been established is the "Novato test." (*See Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Under *Novato*, the charging party must demonstrate that: (1) the employee exercised a protected right; (2) the employer knew the employee exercised a protected right; (3) the employer took adverse action against the employee; and (4) the employer took that adverse action because the employee exercised the protected right.

b. Protected Activity

The Board agent stated in the warning letter that Abrahamian established the "protected activity" prong of Novato when he reported to the district superintendent that another teacher was cheating on the CST. The Board agent discussed two (2) prior PERB decisions regarding protected activity. He stated that an employee engages in protected activity when he or she files a work-related safety complaint (*Los Angeles Unified School District* (1992) PERB Decision No. 957, p. 19) or attempts to elicit group activity by distributing leaflets criticizing his

supervisor's performance. (*State of California, Department of Transportation* (1982) PERB Decision No. 257-S, p. 7.) However, an employee does not engage in protected activity when he photographs his supervisor drinking at a tavern while the supervisor's employer-owned vehicle is parked outside. (See *Id.* at pp. 7-8.) The Board agent then determined that like safety complaints, cheating allegations seemed more connected to working conditions than an employee complaint about the misuse of an employer-owned vehicle after work hours.

We disagree with the Board agent's analysis on protected activity. PERB's jurisdiction is limited to the determination of unfair practices arising under EERA and the other public sector labor statutes which we administer. Whistleblowing in California K-12 public schools is protected under section 44100 et seq., of the Education Code. The remedy provided for interference with the right to disclose improper government activity is "an action for civil damages" brought against the offending party by the whistleblower. (Ed. Code, § 44113(c).) The proper venue to bring an action for civil damages is in a court of law.

PERB has previously held that it lacks jurisdiction over enforcement of the Whistleblower Protection Act and the Education Code. (See *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S; *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046; *American Federation of State, County and Municipal Employees, Council 36 (Moore)* (2011) PERB Decision No. 2165-M; *San Francisco Unified School District* (2009) PERB Decision No. 2040.) PERB does not have jurisdiction where the charging party's allegations are confined solely to violations of the Education Code. (See *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319, 323.) PERB does, however, have jurisdiction to interpret the Education Code whenever it is necessary to administer EERA. (See *Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 9; *San Bernardino City Unified School District* (1989) PERB Decision No. 723.) Moreover,

we have concluded that an employee engages in EERA protected activity when individually seeking to enforce rights stated in a collective bargaining agreement or when employees jointly prosecute alleged violations of workplace rights. (*Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 31.)

In this case, although Abrahamian appears to have engaged in whistleblowing with his wife, who was also a bargaining unit member, the alleged protected activity (reporting to the employer alleged improper conduct by another unit employee) is unrelated to the enforcement of employee workplace rights. Nor does the whistleblowing alleged here seek to enforce any provision in the collective bargaining agreement. Thus, even though he may, or may not, have engaged in the whistleblowing at CVHS in concert with another employee, it does not amount to protected activity under EERA.

We conclude, therefore, that Abrahamian did not engage in conduct protected under EERA when he reported to the employer that another bargaining unit member had cheated on the CST and CAHSEE. That Abrahamian has not engaged in EERA protected conduct ends the inquiry: we simply do not have jurisdiction over his claim.[5]

ORDER

The unfair practice charge in Case No. LA-CE-5635-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

[5] The foregoing analysis addresses the protected conduct element of the prima facie case as dispositive to the dismissal. There are, however, multiple grounds for dismissal. We agree with the Board agent that although Abrahmian's allegations establish adverse action, they likewise are insufficient to establish either employer knowledge or nexus.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377

May 14, 2012

Dr. Asad Abrahamian

Re: *Asad Abrahamian v. Coachella Valley Unified School District*
Unfair Practice Charge No. LA-CE-5635-E
PARTIAL DISMISSAL

Dear Dr. Abrahamian:

Asad Abrahamian (Abrahamian or Charging Party) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB) on November 30, 2011. The charge alleges that the Coachella Valley Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA)[1] by transferring Abrahamian because he engaged in protected conduct.

Charging Party was informed in the attached Warning Letter dated February 15, 2012 that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to March 9, 2012, the allegations would be dismissed.

The February 15, 2012 Warning Letter raised several concerns. First, the original charge failed to allege sufficient facts to show that it was filed timely. Additionally, the original charge failed to establish that the relevant decision maker knew about Charging Party's alleged protected activity. Lastly, the original charge failed to establish the "illegal motivation" requirement that is necessary to find a prima facie case of retaliation.

On March 9, 2012, PERB received a timely amended charge.[2] The March 9, 2012 amended charge addresses some of the concerns discussed in the February 15, 2012 Warning Letter.

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] In his amended charge, Charging Party also alleges that on February 16, 2012, Respondent placed him on administrative leave in retaliation for the filing of this PERB unfair practice charge. This letter addresses only the allegation that Respondent retaliated against Charging Party by transferring him. The allegation concerning retaliation for filing the unfair practice charge will be addressed in a separate document.

The amended charge alleges that Charging Party received notice of his involuntary transfer on June 1, 2011, thereby placing Respondent's conduct within the six-month statutory period (Gov. Code, § 3541.5(a)(1).)

As a whole, the amended charge recites much of the same information contained in the original charge. The amended charge does not provide facts demonstrating that the relevant decision maker knew of Charging Party's alleged protected activity. The amended charge also does not provide facts demonstrating the close temporal proximity needed to establish illegal motivation.

Therefore, the allegation that Respondent retaliated against Charging Party by transferring him is hereby dismissed based on the facts and reasons set forth in this and the February 15, 2012 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (PERB Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
James Coffey
Regional Attorney

Attachment

cc: Milton E. Foster, Attorney

JC

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
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February 15, 2012

Donald R. Holben, Attorney
Holben & Associates
5030 Camino de la Siesta, Suite 350
San Diego, CA 92108-3119

Re: *Asad Abrahamian v. Coachella Valley Unified School District*
Unfair Practice Charge No. LA-CE-5635-E
WARNING LETTER

Dear Mr. Holben:

Asad Abrahamian filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB) on November 30, 2011. The charge alleges that the Coachella Valley Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by transferring Abrahamian because he engaged in protected conduct.

BACKGROUND AS ALLEGED

Abrahamian was a teacher at Coachella Valley High School (Coachella). Mrs. Arragee is a teacher and a "union member" who apparently worked with Abrahamian at Coachella. In 2008, Abrahamian told Arragee that he had seen a teacher engage in "systematic cheating" while administering a test. Abrahamian asked Arragee what he should do. It does not appear that Arragee held a union office at the time. Nor does it appear that Arragee said or did anything to indicate that she represented "the union" while Abrahamian was speaking to her.

Ms. Arredondo is the Principal at Coachella. On some unspecified date—presumably in 2008—Arredondo "confronted" Abrahamian and told him to stop spreading "rumors" about teachers "cheating."

Ken Braithwaite is a teacher and a "union member." On some unspecified date—presumably in 2008 or 2009—Braithwaite "physically attacked" Abrahamian. It does not appear that Braithwaite held a union office or that he said or did anything to indicate that he was acting on behalf of the union.

In 2009, Abrahamian obtained additional "evidence" of teacher "cheating." He reported his evidence to the District's "superintendent."

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

On October 15, 2010, a group of students "assaulted" Abrahamian "near the teacher's lounge." According to the charge, "[s]ecurity personnel and administrators were conspicuously absent" from the scene.

On some unspecified date, the District transferred Abrahamian to West Shore High School (West Shore). Abrahamian commutes "100 miles round trip each day" to West Shore. It is assumed that Abrahamian commuted less than 100 miles per day when he worked at Coachella. The charge continues, in pertinent part, as follows:

> On or about June 1, 2011, Mr. Abrahamian submitted a Certificates Grievance to [the District] regarding imposition of an involuntary transfer of [Mr. Abrahamian], and further allegations of discrimination and harassment following whistle-blower reports [that he filed in 2008 and 2009] and failure to properly investigate assault and battery that occurred at the school site [on October 15, 2010], in violation of the initial terms of the contract without reasonable cause.

The theory of the charge seems to be that the District transferred Abrahamian—and took other unspecified adverse actions against him—because he reported teacher cheating in 2008 and 2009.

DISCUSSION

1. Statute of Limitations

A charging party must provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (Cal. Code Regs., tit 8., § 32615(a)(5).) That means the charging party must allege "who" did "what" and "when" they did it. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 (*Ragsdale*).) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873, p. 12.)

Also, PERB cannot issue a complaint based on conduct that occurred more than six months before the charge was filed. (Gov. Code, § 3541.5(a)(1).) The charging party must allege facts to show that the charge was timely filed. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929, p. 6; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) The limitations period begins to run once the charging party knows, or should have known, of the allegedly wrongful conduct. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.)

Abrahamian's core complaint is that the District transferred him to West Shore. The charge shows that he filed a grievance contesting the transfer on June 1, 2011. Thus, the charge is clear about "when" Abrahamian filed his grievance. But the six-month statute of limitations began to run "when" Abrahamian knew or should have known about the allegedly wrongful

transfer—not when he filed a grievance contesting the action. The charge does not, however, say "when" Abrahamian discovered the transfer. Accordingly, the charge does not allege sufficient facts to show that it was filed timely. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1929, p. 6.)

Further, to the extent that Abrahamian is alleging that the District took *other* adverse actions against him, the charge does say "what" those actions were, "when" the District took those actions, or "when" Abrahamian discovered those actions. (*Ragsdale*, *supra*, PERB Decision No. 944.)

2. Retaliation

EERA gives employees the right to participate in the activities of employee organizations. (Gov. Code, § 3543.) An employer may not retaliate against an employee who exercises that protected right. (Gov. Code, § 3543.5(a).)

To establish a prima facie case of retaliation under the EERA, PERB applies "the *Novato* test." (See *Novato Unified School District* (1982) PERB Decision No. 210.) Under that test, the charging party must show that: (1) the employee exercised a protected right; (2) the employer knew that the employee exercised a protected right; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action *because* the employee exercised the protected right. (*Id.* at p. 6; *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 8 (*Palo Verde*) ["adverse action" is an implied part of *Novato* test].)

a. Protected Activity

An employee engages in protected activity when he or she files a work-related safety complaint. (*Los Angeles Unified School District* (1992) PERB Decision No. 957, p. 19; *Pleasant Valley School District* (1988) PERB Decision No. 708, p. 15.) Similarly, an employee engages in protected activity when he distributes leaflets criticizing his supervisor's performance, provided the leaflets are intended to "elicit group activity." (*State of California, Department of Transportation* (1982) PERB Decision No. 257-S, p. 7 (*Transportation*), citing *Dreis & Krump Mfg. Co. v. NLRB* (7th Cir. 1976) 544 F.2d 320.) In contrast, an employee does *not* engage in protected activity when he photographs his supervisor drinking in a tavern after hours while the supervisor's employer-owned vehicle is parked outside. (*Transportation*, *supra*, PERB Decision No. 257-S, pp. 7-8.) In the latter case, PERB concluded that the photographs were only peripherally related to "working conditions" and thus did not further the "legitimate interest of the [other] employees." (*Id.*, at p. 8.)

In this case, Abrahamian, in essence, filed a complaint with "the superintendent" in 2009 alleging that a teacher or teachers were cheating on test results. Like safety complaints, Abrahamian's "cheating" complaint seems more connected to working conditions than an employee's complaint about the misuse of employer-owned vehicle after hours.

Accordingly, the charge establishes the "protected activity" prong of *Novato*.

b. Adverse Action

PERB asks whether a reasonable person under the same circumstances would consider the employer's action to have an adverse impact on the employee's employment. (*Palo Verde, supra*, PERB Decision No. 689, p. 12; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) In this case, it is assumed that Abrahamian's commute is longer now than it was before the District transferred him. An objective person reasonably would conclude that a longer commute adversely impacts employment. If nothing else, it requires the employee to spend more time and money just getting to work.

Accordingly, the charge establishes the "adverse action" prong of *Novato*.

c. Employer Knowledge

To establish the "knowledge" prong of *Novato*, the charge must allege facts to show that the relevant *decision maker* knew about the protected activity. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *Sacramento City Unified School District* (1985) PERB Decision No. 492.)

In this case, Abrahamian complained to the unnamed "superintendent" in 2009. It is thus clear that the "superintendent" (whoever he or she was) knew about Abrahamian's complaint. But the charge fails to show that the "superintendent" in 2009 was still the superintendent when the District transferred Abrahamian. Further, assuming "the superintendent" had not changed between the 2009 complaint and the transfer, the charge fails to allege that the superintendent was the person who ordered the transfer. In other words, the charge does not identify the relevant decision maker.

Accordingly, the charge fails to establish the "knowledge" prong of *Novato*.

d. Motivation

To establish illegal motivation, a charging party must, at a minimum, show a close temporal proximity between the employee's protected act and the employer's adverse action. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*).) Generally, a "close proximity" would be less than five months. (See *El Dorado County Office of Education* (1990) PERB Decision No. 788, p. 8 [seven months too long to create inference of illegal motive]; *Los Angeles Unified School District* (1998) PERB Decision No. 1300 [five months too long to create inference of illegal motivation].)

In this case, Abrahamian filed his "cheating complaint" in 2009. It appears the District transferred him sometime *after* October 15, 2010, and perhaps closer to June 1, 2011. Thus, the *minimal* amount of time that elapsed between Abrahamian's protected activity and the District's adverse action is almost ten months.

Accordingly, the charge fails to establish the close "temporal proximity" needed to establish illegal motivation.

Nevertheless, if it is assumed that the charge alleges a temporal proximity, that fact is *not sufficient* to establish illegal motivation. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) The charge must also allege facts establishing one or more of the following: (1) the employer treated the employee differently from similarly situated employees (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S (*Transportation*)); (2) the employer departed from established procedures when it took the action (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer gave inconsistent or contradictory justifications for the action (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S (*Parks and Recreation*); (4) the employer failed to offer, or offered exaggerated, vague, or ambiguous, justifications for its action; (5) or any other facts that might show a connection or "nexus" between the protected activities and the employer's adverse action. (*North Sacramento, supra*, PERB Decision No. 264.) The charge does not allege any of the additional facts.

Accordingly, the charge fails to establish the "illegal motivation" prong of Novato.

CONCLUSION

For the reasons discussed above, the charge does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies discussed above, you may amend the charge. You should prepare the amended charge on a standard PERB unfair practice charge form, clearly label it First Amended Charge, include all the facts and allegations you wish to make, and have an authorized agent sign it under penalty of perjury. You must include the case number on the top right hand corner of the charge form. You must serve the amended charge on the Respondent's representative and file the original

[2] A prima facie case is established where the Board agent can determine that the alleged facts state a legal cause of action and that the charging party can provide admissible evidence to support the allegations. (*Eastside Union School District* (1984) PERB Decision No. 466, pp. 6-7.) If the investigation produces conflicting allegations of fact or contrary theories of law, then the Board agent must issue a complaint. (*Ibid.*)

proof of service with PERB. **If you do not file an amended charge or withdrawal on or before March 9, 2012,[3] PERB will dismiss this charge.** If you have any questions, please all me.se

Sincerely,

Aarry J. Gibbons
Senior Regional Attorney

HG

[3] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (Cal. Code Regs., tit 8, § 32135.)